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No. 112

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA

v.

EDWARD BENZ

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	3
Argument:	
I. Preliminary statement	6
II. The decisions of this Court and of other courts tend to support the conclusion that the beginning of service of a sentence ends the power of the court even in the same term to change it	9
III. Considerations regarding the division of powers between the judiciary and the other branches of Government tend to support the conclusion that the power of the trial court to amend its sentence should cease when the defendant has been committed	16
Conclusion	23

CITATIONS

Cases:	
Ammon v. *Johnson*, 3 Ohio Cir. Ct. 263	15
Archer v. *Snook*, 10 F. (2d) 567	12
Basset v. *United States*, 9 Wall. 38	6
Biddle v. *Shirley*, 16 F. (2d) 566	7
Biddle v. *Thiele*, 11 F. (2d) 235	7
Bonner, In re, 151 U. S. 242	6
Brabandt v. *Commonwealth*, 157 Ky. 130	15
Brittain, matter of, 93 N. C. 587	15
Brown v. *Rice*, 57 Me. 55	16
Brown v. *Walker*, 161 U. S. 591	16
Bryant v. *United States*, 214 Fed. 51	7
Cahill v. *Biddle*, 13 F. (2d) 827	7
Cisson v. *United States*, 37 F. (2d) 330	12
Commonwealth v. *Mayloy*, 57 Pa. 291	15
Emerson v. *Boyles*, 170 Ark. 621	15

Cases—Continued. Page

Gordon, Ex parte, 1 Black 503 ..... 9, 10
Graves, In re, 117 Fed. 798 ..... 6, 12
Crossman, Ex parte, 267 U. S. 87 16
Hammers v. *United States*, 279 Fed. 265 6
Harlan, Ex parte, 180 Fed. 119 7
Hynes v. *United States*, 35 F. (2d) 734 12
Johnson, In re, 46 Fed. 477 7
Jones In re, 35 Neb. 499 16
King v. *Price*, 6 East 323 8
Lange, Ex parte, 18 Wall. 163 ..... 7, 8, 10–11
Laura, The, 114 U. S. 411 16
Miller v. *Snook*, 15 F. (2d) 68 12–15
Peeke, Ex parte, 144 Fed. 1016 7
People v. *Meservey*, 76 Mich. 223 16
People v. *Sullivan*, 54 Misc. 489 16
Plain v. *State*, 60 Ga. 284 15
Rex v. *Fletcher*, R. & Ry. C. C. 58 8
Richards, In re, 150 Mich. 421 16
State v. *Cannon*, 11 Ore. 312 16
State v. *Davis*, 31 La. Ann. 249 15
State v. *Ensign*, 30 Idaho 539 15
State ex rel. Reid v. *District Court*, 68 Mont. 309 15
State v. *Meyer*, 86 Kans. 793 16
Stewart v. *United States*, 300 Fed. 769 12
Tanner v. *Wiggins*, 54 Fla. 203 15
United States, Ex parte, 242 U. S. 27 ..... 5, 7, 17
United States v. *Carpenter*, 151 Fed. 214 7
United States v. *Howe*, 280 Fed. 815 12
United States v. *Mayer*, 235 U. S. 55 6
United States v. *Murray*, 275 U. S. 347 ..... 5, 7, 11–12, 18, 19, 21–22
United States ex rel. Whitaker v. *Mathues*, 9 F. (2d) 913 6
Waterman, Ex parte, 33 Fed. 29 6
Yutz v. *Pearman*, 33 F. (2d) 906 15

Constitution:
Art. II, sec. 2, cl. 1 16

Statutes:
Act of June 25, 1910, c. 387, 36 Stat. 819 (U. S. C., title 18, secs. 714–723) 20
Act of March 4, 1925, c. 521, 43 Stat. 1259 (U. S. C., title 18, secs. 724–727) 18
Act of May 13, 1930, c. 255, 46 Stat. 20

Miscellaneous:
1 Chitty, Criminal Law, 722 8

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OPINIONS BELOW

No opinion was rendered by the District Court. Its order which the Government is seeking to have reviewed will be found in the certificate. (R. 1.)

JURISDICTION

The certificate of the Circuit Court of Appeals was filed in this Court on May 13, 1930. The jurisdiction of this Court is conferred by Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

While the period for which the appellee was originally sentenced has now expired, the certificate shows (R. 1) that he was released at the expiration of the shorter term fixed by the amended sentence, upon the giving of a bond for his return to serve the remainder of his original sentence if the amended sentence should be declared void. As he remains subject to be recommitted if this Court should hold that the District Court was without power to amend the sentence, the case is not moot.

QUESTION PRESENTED

The question certified is the following:

After a District Court of the United States has imposed a sentence of imprisonment upon a defendant in a criminal case, and after he has served a part of the sentence, has that court, during the term in which it was imposed, power to amend the sentence by shortening the term of imprisonment?

STATEMENT

The facts are set forth in the certificate as follows:

> Edward Benz was indicted at the June term, A. D. 1929, of the District Court of the United States for the Eastern District of Pennsylvania for a violation of the national prohibition act. On a plea of guilty, entered at the December term, A. D. 1929, of the said court, he was sentenced to imprisonment for a term of ten months to commence December 27, 1929. He has been in prison since that date. On a petition by Edward Benz pray-

ing that his sentence be modified, the District Court on March 7, 1930, before the expiration of its said December term, and over the objection of the United States, made an order "that the sentence heretofore imposed upon the above-named defendant on December 12, 1929, of—

" 'Imprisonment in the Mercer County jail, at Trenton, N. J., for a term of ten (10) months from December 27, 1929,' be changed and modified to the following:

" 'Imprisonment in the Mercer County jail, at Trenton, N. J., for a term of six (6) months from December 27, 1929.' "

From that order the United States appealed. Pending the appeal the Circuit Court of Appeals, feeling that the question raised was one of importance to the administration of Federal criminal law and therefore should be certified to the Supreme Court, and being conscious that pending the certification the defendant might have served the full term of the sentence originally imposed, made an order for his release from prison upon the expiration of the shorter amended term, upon condition that he give bond for his return to prison to serve out the remainder of the longer term if the amended sentence should be found unlawful.

SUMMARY OF ARGUMENT

I

The trial court for many purposes has power to revoke or amend its judgment in a criminal case during the term in which the judgment was en-

tered, even though the execution of the sentence by the defendant has commenced. But this power of the trial court over its judgments is not complete, and several limitations upon it follow from the decisions of this Court.

An examination of the English and colonial authorities prior to the adoption of the Federal Constitution does not shed any clear light upon the powers which the courts exercised at that time with respect to the present question. There are no express constitutional or statutory provisions which seem to have a direct bearing on the problem.

II

The decisions of this Court and of other courts lend support to the conclusion that the beginning of service of a valid sentence ends the power of the court, even in the same term, to change it. Although there are no decisions of this Court which involve the precise question now presented, there are at least three decisions which contain expressions favorable to our contention. The decisions of the lower Federal courts also support the position of the Government. Although there is some conflict in the decisions of the state courts upon the question, we contend that the greater number and the better reasoned of these decisions reach the conclusion that the trial court has no power to alter or amend a valid sentence after the defendant has been committed.

III

Considerations regarding the division of powers between the judiciary and the other branches of the Government support the same conclusion. The doctrine of separation of powers is not a rigid formula nor a technical rule of law, but we submit that it furnishes a useful guide in determining the extent of judicial power which may conflict with the exercise of executive or legislative authority. In *Ex parte United States*, 242 U. S. 27, and in *United States* v. *Murray*, 275 U. S. 347, this Court has indicated limitations upon the judicial power which are derived from the doctrine of separation of powers. The latter of these two decisions is, we submit, especially pertinent in the consideration of the present case.

The Constitution has given to the President power to pardon offenses, and Congress by appropriate legislation has established a Board of Parole. Both the constitutional and the legislative grants indicate an intention that the power to reduce the length of a sentence after it has been partially served should be exercised by the executive and not by the courts. We contend further that in the absence of specific legislation a result should not be reached which would impose upon the district judges the duty of hearing petitions for reduction of sentences validly imposed which properly should be addressed to another branch of the Government.

ARGUMENT

I

PRELIMINARY STATEMENT

We contend that after a sentence has been validly imposed in a criminal case and service of the sentence has begun, the District Court is without power to amend the sentence, and that, therefore, the order entered in this case reducing the sentence was erroneous.

It is, of course, settled that for many purposes the trial court has power to revoke or amend its judgment in a criminal case during the term in which the judgment was entered, even though the execution of the sentence by the defendant has commenced. Thus, the trial court may grant a new trial during the term in which the judgment was rendered after the defendant has commenced to serve his sentence. *Basset* v. *United States,* 9 Wall. 38.[1] And if the court sentenced the defendant to imprisonment in an institution in which it had no power to order his confinement, the defendant may be recalled and resentenced to the proper institution. *In re Bonner,* 151 U. S. 242.[2] Fur-

[1] The court can not grant a new trial after the expiration of the term. *United States* v. *Mayer*, 235 U. S. 55.

[2] See also *United States ex rel. Whitaker* v. *Mathues*, 9 F. (2d) 913 (C. C. A. 3d); *Ex parte Waterman*, 33 Fed. 29 (N. D. N. Y.); *In re Graves*, 117 Fed. 798 (E. D. Wis.). The defendant may be resentenced in such a case even after the term has expired. *Hammers* v. *United States*, 279 Fed. 265 (C. C. A. 5th).

thermore, if the sentence imposed is void because contrary to the terms of the statute, there is no doubt that the court may correct its judgment,[3] and this may be done even after the term has expired.[4]

On the other hand, it is clear that the power of the trial court over its judgments is not unlimited even during the term at which the sentence was imposed. One such limitation is illustrated by the decision in *Ex parte Lange,* 18 Wall. 163, which is discussed *infra,* pp. 10–11. Another limitation on the power of the trial court appears in the decision in *Ex parte United States,* 242 U. S. 27, where it was held that the trial court in the absence of statute could not validly suspend the execution of its sentence. And another limitation is found in the decision in *United States* v. *Murray,* 275 U. S. 347, where it was held that the court had no power to grant probation under the Federal Probation Act after service of the sentence had commenced, even though the term at which the sentence was imposed still continued.

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[3] *United States* v. *Carpenter*, 151 Fed. 214 (C. C. A. 9th); *Biddle* v. *Thiele*, 11 F. (2d) 235 (C. C. A. 8th); *Cahill* v. *Biddle*, 13 F. (2d) 827 (C. C. A. 8th); *Biddle* v. *Shirley*, 16 F. (2d) 566 (C. C. A. 8th); *Ex parte Peeke*, 144 Fed. 1016 (D. N. J.); *Ex parte Harlan*, 180 Fed. 119 (N. D. Fla.). *In re Johnson*, 46 Fed. 477 (C. C. D. Mass.), is apparently *contra.*

[4] *Bryant* v. *United States*, 214 Fed. 51 (C. C. A. 8th); *Ex parte Peeke*, 144 Fed. 1016, 1020 (D. N. J.).

22404—30——2

It thus appears that there is no basis upon which it can be contended that as a matter of logical necessity the power of the court over its sentence in a criminal case does, or does not, end when the defendant begins to serve his sentence. But the distinction between the correction of judicial error and the amendment of a valid sentence seems to be clearly drawn.

One approach to the consideration of the problem of the extent of the judicial power is to determine whether the particular power in question was exercised at the time of the adoption of the Constitution; but an examination of the English and colonial authorities prior to that time does not shed any clear light on the problem.[5]

There are no express constitutional or statutory provisions which seem to have a direct bearing on the problem. But we contend below (pp. 16–22) that the doctrine of separation of powers implied from the Constitution requires a decision that the

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[5] There are two English decisions in the period shortly after the adoption of the Federal Constitution which indicate that the English courts at that time did regard themselves as having power to amend an erroneous sentence after the commitment of the defendant. In *Rex* v. *Fletcher*, R. & Ry. C. C. 58, 60 (1803), it was said that "the sentence may be corrected or altered at any time during the assizes." And in *King* v. *Price*, 6 East 323, 328 (1805), the sentence of the defendant was increased during the term, when the original sentence imposed had been erroneous. See 1 Chitty, Criminal Law 722. See also the material collected in the dissenting opinion of Mr. Justice Clifford in *Ex parte Lange*, 18 Wall. 163, 178.

power exercised in this case by the trial court was an interference with the powers of the other branches of the Government, and that it was consequently erroneous.

With the foregoing considerations as a background, we shall discuss the decisions of this and of other courts and present certain other contentions which, we submit, tend to support the conclusion that the power of the trial court to alter or amend its sentence in the situation disclosed by the certificate in this case ceases when the defendant has been committed to the custody of the executive authorities.

II

THE DECISIONS OF THIS COURT AND OF OTHER COURTS TEND TO SUPPORT THE CONCLUSION THAT THE BEGINNING OF SERVICE OF A VALID SENTENCE ENDS THE POWER OF THE COURT EVEN IN THE SAME TERM TO CHANGE IT

There is apparently no decision of this Court which involves the precise question which is now presented. But there are at least three decisions in which this Court has referred to the question and in which there are expressions favorable to our contentions.

In *Ex parte Gordon*, 1 Black 503, it appeared that the defendant had been convicted of piracy and sentenced to death, and a warrant had been issued and placed in the hands of the marshal. The defendant thereupon applied for a writ of prohibition from this Court to restrain the judges of

the lower court and the marshal from proceeding further in the case. This Court refused the writ, giving as its reason, among others, that (p. 505)—

> the case has now passed out of the hands of the court, and the warrant is in the hands of the marshal commanding him to execute the judgment of the court. The Circuit Court itself has not now the power to recall it, * * *.

Perhaps the leading case in this Court on the subject is *Ex parte Lange,* 18 Wall. 163. Although this decision is not controlling here because of the difference in facts, it has frequently been cited for the proposition that the court has no power to reduce a sentence after the prisoner has been committed. In that case the trial court imposed a sentence of both fine and imprisonment, although the statute authorized a sentence of fine or imprisonment. The defendant entered upon the service of his sentence of imprisonment and also paid the fine, which was received by the clerk and deposited in the United States Treasury. Thereupon the defendant applied for a writ of *habeas corpus;* the court then revoked the original sentence and imposed a prison sentence the same as the original prison sentence, but omitted the fine. The defendant's money was not returned because it was in the public treasury. Under the circumstances, this Court held that by paying the fine the prisoner had executed one of the alternative sentences allowed by law and that to impose in addition a prison sen-

tence was to punish him twice for the same offense. In the course of its opinion, this Court said (pp. 168, 174):

> The judgment of the court to this effect being rendered and carried into execution before the expiration of the term, can the judge vacate that sentence and substitute fine or imprisonment, and cause the latter sentence also to be executed? Or if the judgment of the court is that the convict be imprisoned for four months, and he enters immediately upon the period of punishment, can the court, after it has been fully completed, because it is still in session of the same term, vacate that judgment and render another, for three or six months' imprisonment, or for a fine? Not only the gross injustice of such a proceeding, but the inexpediency of placing such a power in the hands of any tribunal is manifest.
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> * * * * *
>
> If the court, for instance, had rendered a judgment for two years' imprisonment, it could no doubt, on its own motion, have vacated that judgment during the term and rendered a judgment for one year's imprisonment; or, if no part of the sentence had been executed, it could have rendered a judgment for two hundred dollars fine after vacating the first. * * *

The latest decision of this Court in which the subject is mentioned is *United States* v. *Murray*, 275 U. S. 347. In that case it was held that when

a person sentenced to imprisonment by a District Court has begun to serve his sentence, that court has no power under the Probation Act to grant him probation, even though the term at which sentence was imposed has not expired. This Court in its opinion said (p. 358):

> The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it. *Ex parte Lange,* 18 Wall. 163.

The power to grant probation when imposing sentence is a part of the power to impose the sentence. It follows that *United States* v. *Murray, supra,* should be decisive in the instant case.

The first Federal court case directly deciding the present question appears to be *Miller* v. *Snook,* 15 F. (2d) 68 (N. D. Ga.).[6] In that case a sentence of 18 months' imprisonment in the Atlanta Penitentiary was imposed. After commitment had issued and the marshal was on his way to the penitentiary with the prisoner, the court, during the same term, but without notice to the marshal, made an order reducing the sentence to a year and

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[6] There is language favorable to the Government's contentions in several other decisions of the lower Federal courts, but the present question was not actually involved in those cases. See *United States* v. *Howe*, 280 Fed. 815, 819 (C. C. A. 2nd); *Stewart* v. *United States*, 300 Fed. 769, 777 (C. C. A. 8th); *Archer* v. *Snook*, 10 F. (2d) 567, 568 (N. D. Ga.); *Hynes* v. *United States*, 35 F. (2d) 734, 735 (C. C. A. 7th); *Cisson* v. *United States*, 37 F. (2d) 330, 332 (C. C. A. 4th). And see *In re Graves*, 117 Fed. 798 (E. D. Wis.), apparently *contra*.

a day. Upon instructions of the Attorney General, the warden treated the order as void and refused to release the prisoner after the expiration of the year and a day, whereupon the prisoner sought his release on *habeas corpus*. In holding that the trial court's order reducing the sentence was void, it was said (p. 69):

> The general rule is that at any time during the term the court has power to reconsider its judgment, and to revise and correct it by mitigating and even by increasing its severity, where the original sentence has not been executed or put into operation. Where defendant, however, has executed or entered upon the execution of a valid sentence, the court can not, even during the term at which the sentence was rendered, set it aside and render a new sentence, nor can it amend the judgment so as to be in effect a new sentence. * * * It has been held that, where a sentence has been partly executed, it may be revised, and another in diminution or mitigation substituted for it during the term; but, so far as such cases have been observed by me, they were either those in which an oral judgment had not been finally reduced to writing and recorded as the judgment of the court, or else were cases in which it was the prisoner who was seeking to set aside the entire judgment because of the diminution, the courts holding that it did not lie in his mouth to complain of that which was in his favor. * * *.

Here, however, it is the other party to the case, the prosecuting government, which is contending that the effort to mitigate is in excess of the power of the judge and ineffectual to alter the original sentence. * * * Logically, if the reason why an increase can not be made is a want of power in the court, that want of power prevents any alteration of the substance of the sentence. Under our system of government the judicial and executive functions are very substantially separated. The ascertainment of guilt and the fixing of punishment are essentially judicial. The seeing that the punishment is executed and enforcing the judgment of the court is executive. Discretion is given the courts in fixing punishment before execution begins, but after execution commences the prisoner is considered to be beyond the power of the court and in the hands of the executive. The rights of prosecution and prisoner then become fixed. By losing possession of the prisoner, the court loses control of his case, unless control is resumed by some proper proceeding, such as a motion for a new trial or a habeas corpus. The executive may afterwards commute or pardon, but the judge can do neither. Yet the effect of his then altering or reducing the sentence would be commutation or pardon to that extent.

Considering our frame of government, it would seem that the power of the court should logically end when the prisoner passes into the custody and control of the executive

> under a legal and valid sentence. The commitment is the document which marks the surrender by the court to the executive of the prisoner. It is issued by the clerk of the court to the keeper of the prison and in the name of the President, and authorizes the prison keeper to receive and hold the prisoner. In a jail sentence, when a prisoner is actually committed to jail, unquestionably he is in the hands of the executive for the execution of that sentence.

Another decision sustaining the Government's contentions is *Yutz* v. *Pearman,* 33 F. (2d) 906 (E. D. S. C.).

The decisions of the state courts on the subject are in some conflict.[7] But we believe that the greater number and the better reasoned of these decisions support the Government's contentions. Apparently without exception the state courts hold that the trial court has no power to increase a valid sentence even at the same term after the defendant

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[7] The following decisions are in accord with the Government's contention: *Emerson* v. *Boyles*, 170 Ark. 621; *Tanner* v. *Wiggins*, 54 Fla. 203; *State* v. *Ensign*, 38 Idaho 539; *Brabandt* v. *Commonwealth*, 157 Ky. 130; *State* v. *Davis*, 31 La. Ann. 249; *State ex rel. Reid* v. *District Court*, 68 Mont. 309; *Commonwealth* v. *Mayloy*, 57 Pa, 291.

The following cases are opposed to the Government's contention: *Plain* v. *State*, 60 Ga. 284; *Ammon* v. *Johnson*, 3 Ohio Cir. Ct. 263; *Matter of Brittain*, 93 N. C. 587. But in *Plain* v. *State*, it was the defendant who objected to the reduction, not the Government; and in *Ammon* v. *Johnson*, the offense for which the sentence was imposed was a contempt of court.

has commenced to serve the original sentence.[8] If, as these courts hold, the trial court lacks power to increase a valid sentence after the defendant has been committed, it would seem to follow that the court must likewise lack power to decrease such a sentence.

III

CONSIDERATIONS REGARDING THE DIVISION OF POWERS BETWEEN THE JUDICIARY AND THE OTHER BRANCHES OF GOVERNMENT TEND TO SUPPORT THE CONCLUSION THAT THE POWER OF THE TRIAL COURT TO AMEND A VALID SENTENCE SHOULD CEASE WHEN THE DEFENDANT HAS BEEN COMMITTED

The doctrine of separation of powers is, of course, not a rigid formula nor a technical rule of law. From the beginning, in considering acts of the legislature and of the executive, this Court has refused to draw abstract, analytical lines of separation and has recognized necessary areas of interaction. Although the Constitution (Art. II, Sec. 2, Cl. 1) gives to the President power "to grant Reprieves and Pardons for Offences against the United States," this Court has held that congressional acts of amnesty are valid (*Brown* v. *Walker,* 161 U. S. 591, 601), that Congress can give the Secretary of the Treasury power to remit fines and forfeitures (*The Laura,* 114 U. S. 411), and con-

[8] See *State* v. *Meyer*, 86 Kan. 793; *Brown* v. *Rice*, 57 Me. 55; *People* v. *Meservey*, 96 Mich. 223; *In re Richards*, 150 *Mich.* 421; *In re Jones*, 35 Neb. 499; *People* v. *Sullivan*, 54 Misc. 489; *State* v. *Cannon*, 11 Ore. 312.

versely, that the President may pardon a criminal contempt (*Ex parte Grossman,* 267 U. S. 87).

These decisions make it clear that the doctrine of separation of powers does not necessarily require the decision of this case in favor of the Government; and we make no such contention. But we submit that the doctrine does furnish a useful guide which should be taken into account in defining the power of a court which may conflict with the exercise of executive or legislative authority.

This Court has drawn the line between the judicial and executive power in similar cases, and in each instance it has indicated that the judicial power should be restricted by the implications drawn from the doctrine of separation of powers. There are at least two decisions of this Court furnishing persuasive analogies which tend to support the Government's position in this case.

In *Ex parte United States,* 242 U. S. 27, this Court had before it the question whether a district judge, after the imposition of a sentence, had power to suspend the execution of the sentence at the same term at which the sentence was imposed and before the commitment of the defendant. It was held that, in the absence of a statute, such a power was not to be exercised by the judiciary within the division of functions established by the Constitution. This Court said (pp. 51–52) that the exercise of such a power—

> in the very nature of things amounts to a refusal by the judicial power to perform a

> duty resting upon it and, as a consequence thereof, to an interference with both the legislative and executive authority as fixed by the Constitution.

More recently in *United States* v. *Murray,* 275 U. S. 347, *supra,* the defendant had been sentenced to three months' imprisonment, and, on the same day, he was delivered by the United States marshal, in pursuance of the sentence, to the jail keeper and commenced to serve the sentence. On the next day, and during the same term of court, the District Court entered an order placing him on probation. This Court held that the power to grant probation under the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259; U. S. C., Title 18, Secs. 724–727) ceased when service of the sentence commenced.

This decision, we submit, is logically decisive in the instant case. Although it involved in part the interpretation of the Probation Act, the considerations which led this Court to hold the power of the trial court under that Act ceased when the defendant entered upon the service of his sentence, lead to the conclusion that in the present case the power of the court over the sentence ended at the same time. The granting of probation at the time of sentence is a part of the judgment of the trial court, and in itself an exercise of the power to impose sentence. If the court can not amend its judgment at the term at which it was entered so as to grant probation, we submit that the trial court

likewise does not have power to amend its judgment by reducing the length of the sentence. The power as to probation "passed immediately after imprisonment began" (p. 359). The power to determine the length of the sentence must, we submit, pass at the same time.

It is a truism that those functions which are essentially or primarily judicial should be exercised by courts; those functions which are primarily executive or legislative should be exercised by the executive or the legislature. Of course the division between the powers is not precise. In many places they overlap, and to a very considerable extent their distribution is subject to the control of the legislature. But the power to reduce a sentence after it has been validly imposed and partially executed is essentially an exercise of the power to pardon or commute the sentence, and such power, we contend, is historically and essentially an executive power. Neither the Constitution nor any statute confers such power upon the courts. The ascertainment of guilt and the fixing of punishment, within the limits prescribed by the legislature, are essentially judicial. The court is often given discretion in fixing the punishment and may take into consideration any mitigating circumstances or other factors which it regards as material. But when the court has imposed a valid sentence and has issued its commitment, and the defendant is delivered and held in custody by

the executive, to reduce the sentence thereafter is an interference with executive powers. The Constitution has given to the President power to pardon offenses, including the power to commute sentences, and Congress by appropriate legislation has established a Board of Parole (Act of May 13, 1930, c. 255, 46 Stat. —, amending Act of June 25, 1910, c. 387, 36 Stat. 819; U. S. C., Title 18, Secs. 714–723) with power to parole offenders.

Both the constitutional and the legislative grants indicate an intention that the power to reduce the length of a sentence after it has been partially served should be executed by the Executive and not by the courts. Although the constitutional grant of the power to pardon, and the legislative grant of the power to parole are not in terms exclusive, we submit that the exercise by the courts of a power which is in substance equivalent to these powers is essentially an interference with the other branches of the Government. It will readily be seen that if orders of the nature here involved were sustained and such a practice became general, it would very seriously interfere with the administration of the parole system and the power of executive clemency. Nor is there any need that the courts be given this power in aid of any power essentially judicial. With the power to grant a new trial, with the power to correct a sentence erroneous in law, with the defendant's right to an appeal in case of error, and with the probation system, the courts have ple-

nary judicial power and are entirely unhampered in its exercise. Anything more would be an invasion of executive power to mitigate the sentence if mitigation for any reason be warranted.

In the absence of specific legislation a result should not be reached which will impose upon the district judges the duty of hearing petitions for the reduction of sentences validly imposed which properly should be addressed to another branch of the Government. There would be no limit to the labor imposed upon trial courts if during the same term every individual convicted and sentenced could file a petition asking that his sentence be reduced. Once sentence has been imposed and service of it has begun, the power of the court over the prisoner should cease and any mitigating circumstances should be directed to the consideration of the executive of other officials invested with power by the legislature. This consideration was apparently of weight in the decision of *United States* v. *Murray*, 275 U. S. 347, *supra*, where this Court, in considering the related question under the Probation Act, said (pp. 356–357):

> Nor can we suppose that Congress would wish to grant such extended power in all but life and capital cases to the district judges and thus subject each to the applications of convicts during the entire time until the full ending of the sentences. This would seem unnecessary for the hard-worked district

> judges with their crowded dockets. A more reasonable construction is to reconcile the provisions for probation, parole and executive clemency, making them as little of a repetition as we can. Executive clemency must of course cover every form of relief from punishment. The parole statute provides a board to be invested with full opportunity to watch the conduct of penitentiary convicts during their incarceration and to shorten it not only by the regular monthly reduction of days but by a larger diminution by parole.

The importunities of friends and dependent relatives in such cases are never ending so long as there is the slightest hope that the judge may be induced by sympathy to modify a judgment which has been considered and rendered according to law in termination of judicial process. From such appeals the judge should be relieved when he has imposed a valid sentence which has been executed by the commitment.

CONCLUSION

The question certified should be answered in the negative.

Respectfully submitted.

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